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JOHN F. DAVIS, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

Nos. 847-877

NICHOLAS deB. KATZENBACH, *et al.*,

Appellants,

v.

JOHN P. MORGAN and CHRISTINE MORGAN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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Statement of the Case

This case was an action brought by plaintiffs-appellees, voters in New York City, against defendant-appellant, as Attorney-General of the United States, for a declaratory judgment that Section 4(e) of the Voting Rights Act of 1965 was unconstitutional, and for an injunction restraining defendant from enforcing the statute. A statutory three-judge court was convened pursuant to 28 U.S.C. §§2282, 2284, and the Court held that the aforesaid Act of Congress was unconstitutional. The opinion is not yet reported. This appeal is from that decision.

Question Presented

Whether Section 4(e) of the Voting Rights Act of 1965 is within Congress' constitutional power to enact.

Summary of Argument

Plaintiff voters have standing to contest the constitutionality of the statute because their vote is being diluted through the influx of persons not permitted to vote under state law. Section 4(e) is based on the Fourteenth Amendment. However, as the Fourteenth Amendment does not forbid the states from imposing English-language literacy tests, Congress has no power to pass the statute. The Fourteenth Amendment has nothing to do with the right to vote, but even if it did, an English-language literacy test is reasonable thereunder. Moreover, the distinction between a voter educated in a foreign language school under the American flag and one under a foreign flag is itself arbitrary and violates the Fifth Amendment.

Nor can the statute be upheld under Congress' power to govern the territories. The statute covers schools in all of the states. Even applying it only to Puerto Rico, it controls voting qualifications in the states and not merely in the territories. In this connection, the reasons given by the New York senators who sponsored the proviso is invalid because the treaty on which they rely cannot overcome Congress' constitutional limitations. Finally, ignorance is not a privilege of national citizenship protected by Art. 4, Sec. 2, or the Fourteenth Amendment.

POINT I

The Plaintiff Voters Have Standing to Sue.

A. By Common Law

The Fifth Amendment, enacted in 1791, forbids Congress from taking "liberty" or "property" without due process of law. The Ninth Amendment reserves to the people sundry "rights" not enumerated in the first eight amendments. To determine the meaning of these terms, it is necessary to resort to English common law regarding the right to vote.

Originally, when the electorate was small, the franchise, or "freedom" of a city, was looked on as in the nature of a property right held in common with other electors. *Bagg's Case,* 11 Co. Rep. 93b, 98b, 77 Eng. Rep. 1271, 1278 (1615) holds:

> "when a man is a freeman of a city or borough, he has a freehold in his freedom for life, and with others in their politic capacity, has an inheritance in the lands of the corporation, an interest in their goods, and perhaps it concerns his trade and means of living, and his credit and estimation. . . ."

Only freemen of a borough could vote. *Schuldam* v. *Bunniss,* 1 Cowp. 192, 98 Eng. Rep. 1038 (1774). The franchise, or freedom of a corporation, was deemed a privilege, and not a public office or position. *R.* v. *Morris,* 1 Ld. Raym. 337, 91 Eng. Rep. 1121 (1698). Thus, the nature of an elective franchise under common law as a lifetime property right was clearly shown in *Commins* v. *Oakhampton Corp.,* Sayer 45, 96 Eng. Rep. 797 (1752). Here, the Court of King's Bench specifically held that "the freedom of a

corporation not being transmissible," a father could not inherit it from his son and hence his interest therein did not bar him from testifying on behalf of his son's right to vote. Significantly, the Court further held:

> "It was . . . clearly against the interest of the father, who was himself a freeman, . . . [to allow the son to vote]; for, by the establishment of a custom, under which others as well as his son might obtain their freedom, his own franchise would have been rendered less valuable."

Under common law, only a franchise-holder could sue to prevent another person from unlawfully exercising the franchise; the municipality had no standing to bring the suit. See: *Winton Corp.* v. *Wilks,* 1 Salk. 203, 91 Eng. Rep. 181 (1703); *Wilmott* v. *Nixon,* 1 Lev. 262, 83 Eng. Rep. 398 (1668). Hence, at an early time, it became the uniform rule that no person could challenge a vote cast by another at an election unless he himself was a voter or a candidate. In *Caermarthenshire Case,* 1 Peck. 286, 298 (1803), it was observed:

> "before the St. 10 Geo. 3 [Ch. 16, 1770] under the ancient system, and according to the general practice of the house [of Commons of England], no petition against an undue election was presented except by electors, or candidates; by the St. 10 Geo. 3, (it being wished as much as possible to limit the discretion of the house) *every* petition complaining of an undue election and return was directed to be referred to a select committee; of course, it could then no longer be made an objection to receiving a petition, that it was not the petition of an elector or a candidate; the

St. 28 Geo. 3, [c. 52, §1, 1788], to introduce again the former practice, which was found, by the interruption of it, to have been very convenient, enacted that no petition should be received, except signed as therein mentioned."

The uniform rule in England has thus been that a voter was entitled to challenge the right to vote of another voter. Among the many cases which might be referred to are the following:

Oakhampton Case, 1 Fras. 69 (1791);
Boston Case, 1 Peck. 434 (1803);
Caermarthenshire Case, 1 Peck. 286, 289-290 (1803);
Pruen v. *Cox,* 2 C.B. 1, 135 Eng. Rep. 839 (1845);
Toms v. *Cumming,* 7 Man. & G. 88, 135 Eng. Rep. 38 (1845);
Knowles v. *Brooking,* 2 C.B. 226, 135 Eng. Rep. 931 (1846);
Breelen v. *Hockin,* 4 C.B. 19, 136 Eng. Rep. 407 (1846);
Woollett v. *Davis,* 4 C.B. 115, 136 Eng. Rep. 446 (1847);
Melbourne v. *Greenfield,* 7 C.B. (n.s.) 1, 141 Eng. Rep. 713 (1859);
Smith v. *James,* L.R. 1 C.P. 138 (1865);
Jones v. *Jones,* L.R. 1 C.P. 140 (1865);
Smith v. *Holloway,* L.R. 1 C.P. 145 (1865);
Pease v. *Middleborough Town Clerk,* [1893] 1 Q.R. 127;
See also *Barr* v. *Chambers,* 22 L.R. Ire. R. 264 (1887);
Re *South Fredericksburgh Voters' List,* 15 Ont. L.R. 308 (1907).

In Halsbury's Laws of England, Elections, 28-29 (3rd ed. 1956), it is stated: "An objection [to registration for voting] can only be made by a person appearing from the electors lists to be himself entitled to be registered."

Since under English common law the franchise was a valuable right which a voter could protect from dilution by unqualified voters, the Fifth and Ninth Amendments to the United States Constitution protects the same right against acts of Congress. Hence, a voter has standing to sue to protect such right.

B. Under New York Law

McKinney's New York Election Law, §171 (1), provides as follows: "Any person who applies . . . for registration . . . for any election may be challenged by any qualified voter . . . " Section 331 (1) provides: "The supreme court or a justice thereof . . . in a proceeding instituted by any voter duly qualified to vote in this state . . . shall, by order, direct to be stricken from the register any name unlawfully thereon. . . . "

The right of a voter to sue to remove the name of an unqualified person on the electoral rolls is by no means unique to New York. See *State ex rel. Bowden* v. *Fontenot*, 132 La. 481, 61 So. 534 (1913); *City of Baltimore* v. *Fledderman*, 67 Md. 161, 8 Atl. 758 (1887). Apparently, this is also the rule in the District of Columbia. See *Arrison* v. *Cook*, 6 Dist. Col. 335 (1868). Where a voter sues to disqualify another purported voter from voting, on constitutional grounds, this raises a "case" or "controversy" which the U.S. Supreme Court may adjudicate on the merits. *Leser* v. *Garnett*, 139 Md. 46, 114 Atl. 840 (1921), *aff'd* 258 U.S. 130, 136 (1922). Hence a voter has a suffi-

cient interest to prevent dilution of his vote to have standing to sue. *Gray* v. *Sanders*, 372 U.S. 368, 375 (1963). See also *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Crampton* v. *Zabriskie*, 101 U.S. 601 (1880).

POINT II

Section 4(e) of the Voting Rights Act of 1965 Violates the Fifth, Ninth and Tenth Amendments to the United States Constitution.

Before passage of the 14th Amendment, it was settled law that the States had exclusive control over the qualifications for voting. *Spragins* v. *Houghton*, 3 Ill. 377, 395-6 (1840); *Huber* v. *Reily*, 53 Pa. St. 112, 115-6 (1866). If at that time, Congress had attempted to usurp control over voting qualifications by adding electors to the rolls in violation of state law, such federal statute would have violated the Tenth Amendment by infringing on powers reserved to the states. It would also have violated the Fifth and Ninth Amendments by diluting unlawfully the votes of voters qualified by state law and thereby infringing on their common-law rights and state-created interests without due process of law and in violation of the reserved common-law rights protected by the Ninth Amendment.

However, in Section 4(e) of the Voting Rights Act of 1965, Congress contended that the Fourteenth Amendment gave it power to set voting qualifications. This is contrary to all the contemporary as well as present-day case law. See: *McKay* v. *Campbell*, 16 Fed. Cas. 157, 160 (No. 8839) (D. Ore. 1870); *Lassiter* v. *Northampton Co. Bd. of Elec-*

tions, 360 U.S. 45 (1959). No cases have held that Congress has power to set voting qualifications under the Fourteenth Amendment.

Moreover, the legislative history of the Fourteenth Amendment in the debates on it in Congress in 1866 show clearly that the Fourteenth Amendment was not intended to cover suffrage (voting qualifications). In the appendix hereto we have duplicated the relevant portions of the legislative history of the Fourteenth Amendment with this set forth explicitly therein. Congress derives no power over literacy tests required by states of voters, or other voting qualifications, from the Fourteenth Amendment.

Moreover, when the 15th Amendment was proposed, various proposals were made to ban denial of the right to vote based on education, property, intelligence, etc. Several of these proposals, and the reasons for the same, are set forth in the appendix. All of these proposals failed and the only thing enacted was a prohibition based on denial of voting due to race, color, or previous condition of servitude. Obviously, there would have been no need to forbid denial of the right to vote based on educational qualifications as part of the 15th Amendment if Congress already had power to forbid this under the 14th Amendment. In 1866 and 1869 Congress failed to restrict the States in their use of literacy tests or other means by which suffrage could be restricted, in the Civil War constitutional amendments. Now Congress wants an encore by mere statute. Such encore is clearly in excess of its power, since the power to enforce the 14th Amendment given in the Fifth Section thereof does not include the power to amend the 14th Amendment by statute. And the Supremacy Clause of the Constitution (Art. VI) makes federal statutes the

"supreme law of the land" only when these statutes are made in "pursuance" of the Constitution. When made contrary to the Constitution they are invalid and impose no duties nor confer any rights.

POINT III

A. An English-Language Literacy Test Is Not Unreasonable Under the Fourteenth Amendment.

It is hornbook law that a State has the power, under the Constitution, to establish and maintain qualifications as a prerequisite to voting, *provided only* that such qualifications are not based on race, color, or previous condition of servitude.

Barring such unconstitutional discrimination, New York State clearly has the authority to require certain literacy standards of her citizens before allowing them to participate in the electoral process. See *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 43 (1959).

That one such literacy standard could be a requirement that any prospective voter be able to speak the English language was upheld in *Camacho* v. *Rogers,* 199 F. Supp. 156 (S.D.N.Y. 1961).

The Fourteenth Amendment is offended "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland,* 366 U.S. 420, 425-6 (1961). Given a valid objective, "State legislatures *are presumed* to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan, supra.*

If any state of facts *may be conceived* to justify a statutory discrimination, this Honorable Court is without au-

thority to set aside such a statute. See *Kotch* v. *Board of Fiver Port Pilot Com'rs.*, 330 U.S. 552; *Metropolitan Casualty Ins. Co. of New York* v. *Bromnell*, 294 U.S. 580; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Atchison, T. & S.F. R. Co.* v. *Matthews*, 174 U.S. 96.

It will take little effort for this Honorable Court to conclude that the State of New York, in enacting the law under attack here, is properly carrying out a legitimate governmental obligation and purpose in requiring all her citizens to be able to speak the English language before participating in the electoral process. Such a requirement speeds up the process of the assimilation of large numbers of foreign speaking citizens into the mainstream of New York and American life, in order that they may properly assume the responsibilities of citizenship that accompany the privileges of citizenship.

Plaintiffs contend that a careful scrutiny of the applicable New York law will convince this Honorable Court that the State of New York, in enacting such a statute, is well within the bounds of exercising a legitimate governmental objective, and that such classification does not constitute an unreasonable classification, under the Fourteenth Amendment standards, even if they covered voting.

B. Even If the Fourteenth Amendment Covered Suffrage, Which It Does Not, Section 4(e) Would Still Be Unconstitutional.

It is obvious that states must, in the very nature of things, make various restrictions and qualifications on the right to vote. It cannot let children of five years of age vote; it cannot let lunatics vote; and various other examples come readily to mind. All cases having passed on the point have

held that imposition of an English-language literacy test is not violative of the 14th Amendment. *Lassiter* v. *Northampton Co. Bd. of Elections*, 360 U.S. 45 (1959); *Camacho* v. *Rogers*, 199 F. Supp. 156 (S.D.N.Y. 1961); *Camacho* v. *Doe*, 31 Misc. 2d 692, 221 N.Y.S. 2d 262 (1958), *aff'd* 7 N.Y. 2d 762, 194 N.Y.S. 2d 33, 163 N.E. 2d 140 (1959). It is entirely reasonable for New York State to require that voters know the English language, since most material about politics and government in New York State is in English only. The fact that something is to be found in Spanish does not detract from the reasonable nature of the restriction, as the above cases have pointed out. Hence, Congress is, as noted above, not enforcing the 14th Amendment, but rather amending it, in abolishing the English language requirement.

Indeed, Congress itself has recognized the close connection between knowledge of English and participation in American civic and political life. In the basic naturalization statute, it provided:

> "No person . . . shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate— (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language . . ." 8 U.S.C. §1423.

None of the cases which have passed on this section have even questioned its constitutionality. See *Petition of Contreras*, 100 F. Supp. 419 (S.D.N.Y. 1951); *In re Swenson*, 61 F. Supp. 376 (D. Ore. 1945); *U. S.* v. *Bergmann*, 47 F. Supp. 765, 766 (S.D. Cal. 1942); *Petition of Katz*, 21 F. 2d 867 (D.C. Mich. 1927). Yet the Fifth Amendment pro-

tects against unjustified discrimination between naturalized and native-born citizens, who are in all respects to be treated equally. *Schneider* v. *Rusk*, 377 U.S. 163 (1964). If this classification were to be considered unreasonable, then the federal naturalization law would be unconstitutional. The fact that it is still on the books shows that knowledge of English does not have a reasonable relation to the duties of citizenship and the right to vote.

The Department of Justice introduced a large number of affidavits below to show that there were Spanish-language newspapers, political pamphlets, and other sources of information printed in New York, but it could not refute plaintiffs' material showing that there is a great deal more material about government and politics printed in English. On the federal level, the Congressional Record immediately comes to mind. Moreover, in small upstate towns in New York there are no Spanish-language publications, as there are in New York City. Hence the New York law is a reasonable regulation, even giving full weight to the Department's evidence of the availability of some Spanish-language material.

It may also be noted that, assuming contrary to fact that the Fourteenth Amendment covers voting, even if it be contended that a state could reasonably let foreign-language residents vote, as long as it is also a reasonable choice not to let them vote, then the Fourteenth Amendment is not violated, because the primary control of voting qualifications is in the states, and Congress can only enforce the Fourteenth Amendment—not amend it. The editorials annexed to the appendix show that the English-language literacy test is reasonable.

POINT IV

The Irrational Distinction Between Education in "American-Flag" and Other Schools in Section 4(e) Violates the Fifth Amendment.

It is settled law that the Fifth Amendment protects against "unjustified" discrimination or distinctions. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). In the Voting Rights Act of 1965, Sec. 4(e), Congress has provided that a citizen who has learned Spanish in Puerto Rican schools may vote in the New York City municipal elections notwithstanding the fact that he cannot read English. However, a citizen who has learned just as much Spanish in Mexico or some other country cannot vote in New York City without knowing English. This is not in any way unlikely since babies born to aliens in the United States who are then taken by their parents abroad and educated there remain citizens although they cannot speak a word of English. See *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898); *Perkins* v. *Elg*, 307 U.S. 425 (1939). If they should then come back to vote they cannot do so, which natives of Puerto Rico can do. Whereas a Puerto Rican may know more about the federal government from his schooling than an American educated abroad, surely he does not know more about the New York City municipal election. Hence this distinction is completely irrational as far as municipal elections are concerned, and being so, the federal law is invalid for making an arbitrary distinction.

POINT V

The Power to Govern the Territories Does Not Extend to the Right to Govern the States.

The first sentence of the Fourteenth Amendment (Sec. 1), provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Hence, a Puerto Rican who moves to New York becomes a citizen of New York, and at that point Congress has no further general power to grant him rights, other than those privileges and immunities of national citizenship which do not, as shown by the legislative history of the Fourteenth Amendment, include voting rights.

Judge McGowan below based his dissent on Art. 4, Sec. 3, cl. 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

The concept of disposing of territory and ruling it are co-extensive. *United States* v. *Gratiot,* 14 Pet. 526, 537 (1840). Congress can sell a territory or grant it independence by statute; it cannot deal with a state in this way. Congress cannot sell New York State and it cannot make New York an independent nation. The power to govern territory extends only to the right to govern people while in that territory. When they become citizens of another state by physically moving they remove themselves both from the rights and the duties imposed by the governing power of

the place of their former residence. Congress can no more give Puerto Ricans the right to vote in New York than can New Jersey give Jerseyites the right to do so. The presence of the Supremacy Clause is no more relevant in the case of Puerto Ricans than is the Full Faith and Credit Clause relevant in the case of residents moving from New Jersey. Neither clause creates substantive constitutional power; both bind the states to respect the exercise of existing power.

In *American Insurance Co.* v. *Canter,* 1 Pet. 511, 542 (1828), Chief Justice John Marshall observed:

> "This treaty [of Spain ceding Florida] is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. . . . They do not, however, participate in political power; they do not share in the government till Florida shall become a State."

In *Pollard's Lessee* v. *Hagan,* 3 Howard 212, 224 (1844), this Court held that "no such power [municipal sovereignty] can be exercised by the United States within a State." Moreover, no treaty can alter this. In the foregoing case, this Court observed:

> "It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it." *Id.* at p. 225.

In *Permoli* v. *New Orleans*, 3 How. 589, 610 (1844), this Court held that all "the laws of congress [governing Orleans Territory] were all superseded by the state constitution" when Louisiana became a state, and it must follow that a citizen of a territory likewise removes himself from the benefit of territorial laws when he moves to a state. See also *Benner* v. *Porter*, 9 How. 235, 242 (1850).

The problem here under consideration was specifically dealt with by Mr. Chief Justice Taney in *Strader* v. *Graham*, 10 How. 92, 94 (1850), where he said:

> "For the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, . . ."

In *Murphy* v. *Ramsey*, 114 U.S. 15, 44-45 (1885), this Court drew a sharp distinction between the right to vote in the states and the right to vote in the territories, saying:

> "The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants

of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

It follows from the foregoing that Congress' constitutional power to confer the right to vote on citizens of territories is limited to voting in those territories, and not in the states.

POINT VI

The Reasons Given for the Constitutionality of the Statute by Senators Javits and Kennedy (N.Y.) Are Without Legal Foundation.

The debate on Sec. 4(e) of the federal statute will be found in the Congressional Record, Senate, for May 20, 1965, pages 10675-10690. In addition, Senator Robert Kennedy, when Attorney-General, on April 10, 1962, in testimony before the Senate Subcommittee on Constitutional Rights, of the Judiciary Committee, also discussed this proposed statute. The gist of the defense of the constitutionality of this statute by the two New York Senators is based on three grounds:

(1) Art. IV, Sec. 3, clause 2, of the Constitution giving Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States";

(2) implied power allegedly existing to protect wards of the federal government;

(3) the Treaty of Paris, 30 Stat. 1754 (1899), which provides that "the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by the Congress."

While these arguments were rejected in *Camacho* v. *Rogers,* 199 F. Supp. 156 (S.D.N.Y. 1961), since they were raised again during the Senate debates, it is worth exposing their fallacies more fully.

(1) Congress' power to govern the territory of Puerto Rico does not give Congress the power to govern New York State. New York State is not a territory. It has been held that when a territory is admitted as a State, Congress' power over it ceases. *Coyle* v. *Smith,* 221 U.S. 559 (1911). *A fortiori,* when a native of a territory migrates to a state, he thereby loses any special protection he had as a resident of the territory. No one could, for example, deny that Congress has power to provide that Puerto Ricans on that island shall drive on the left-hand side of the road, as do the British, but it is equally incontestable that a Puerto Rican could not drive on the left when he came to New York City while everyone else was driving on the right. A resident of a territory, equally with a resident of a sister-state, must obey the laws of the state in which he finds himself.

It has been argued that because Congress encourages the study of Spanish in Puerto Rico, New York must let Spanish-speaking Puerto Ricans vote. Senator Kennedy said: "That his schooling takes place in Spanish is not up to him, but is due to the fact that the U.S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico . . ." May 20, 1965, Cong.

Rec. 10675. First of all, the U.S. Government does not *make* Puerto Ricans study only Spanish. No federal statute makes it a crime to study English in Puerto Rico. Such a law would be clearly unconstitutional since everybody has a constitutional right to study any language he pleases. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Puerto Ricans study Spanish because they want to. This gives no superior right to anybody else. Moreover, the fact that Congress allegedly encourages the study of Spanish makes no difference at all. Congress is entitled to encourage, in the territories, the study of Spanish, French, Russian, Hindi, Japanese, or Tamil, or any other languages it pleases, but this does not mean that New York must let someone who understands only Tamil vote because Congress, for reasons of its own, has encouraged study of this language in a territory, or because a person has decided to accept this encouragement. Congress' right to govern a territory does not give it the right to infringe state sovereignty.

(2) The alleged implied power to protect "wards" of the federal government (assuming Puerto Ricans are "wards" like Indians) may be given short shrift. At best this assumes the right to protect, and not to confer special privileges. No doubt Congress can protect President Johnson from getting shot in New York, but no one can contend that this gives Congress the power to let President Johnson vote for Mayor.

(3) Finally, the memorandum submitted by then Attorney-General Kennedy relies on the Treaty of Paris, mentioned above. This is the nuttiest argument of all. Stripped to its bare bone, it is that the President and Senate can make a treaty which will override the Constitution. The

short answer is: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid* v. *Covert,* 354 U.S. 1, 16 (1957).

In addition, the memorandum submitted by the then Attorney-General Kennedy in 1962 states that Congress may enfranchise Spanish-speaking Puerto Ricans to "encourage the close association of Puerto Rico with this Nation." No doubt Congress would like to encourage close association with the United States on the part of U.N. delegates living in New York City, who pay sales and other taxes, and are vitally affected by the laws of New York. Could Congress thereby let U.N. delegates vote in New York elections? (The idea is not as preposterous as it sounds. Until 1928 aliens resident here were allowed to vote in some states. See *Perez* v. *Brownell,* 356 U.S. 44, 77 (1958); *Spragins* v. *Houghton,* 3 Ill. 377 (1840).) To take a more unlikely example, the federal government has a strong interest in promoting better relations with the Russians. Could it therefore allow Russians to mail in ballots to be counted in the municipal election? No doubt many Russians would like to vote in American elections, considering how little choice they get in their own. Such an experiment might well promote good-will with Russia. But the fact that Congress feels that some voting qualification is unfair, or would be better if changed, does not thereby confer on it power to make the change. The expansion of the federal government is so large these days that it is sometimes forgotten that state government exists. However, the Tenth Amendment is clear; powers not delegated to the federal government are reserved to the states. The 14th Amendment is not a *carte blanc* or open-end cornucopia of federal power. Hence,

Congress having exceeded its power to "enforce" the 14th Amendment, Sec. 4(e) of the Voting Rights Act of 1965 is unconstitutional.

POINT VII

Ignorance Is Not a Privilege or Immunity of National Citizenship.

The government may contend that a literacy test in English violates the privileges and immunities clause of the first section of the Fourteenth Amendment and hence constitutes an unreasonable classification under the Fourteenth Amendment. However, being ignorant or illiterate does not rise to the dignity of a privilege or immunity of national citizenship as protected by the Fourteenth Amendment, and hence such a classification is not covered by the Fourteenth Amendment at all.

Remaining ignorant or illiterate in the principal language of the United States is not a privilege or immunity of national citizenship under Section 1 of the Fourteenth Amendment. There is no constitutional right to be stupid. Since a state may directly compel a person to learn to read and write, it may do this indirectly by refusing to let him vote if he does not do so. No Fourteenth Amendment right is violated by compelling him to learn the national language.

The record below shows that the New York City Board of Education gives adult education courses to persons whose mother tongue is a language other than English in both day and evening courses, free of charge. Any native of Puerto Rico who is willing to exert himself can study and learn English. There is no reason why New York State should put a premium on laziness.

POINT VIII

The Corporation Counsel's Argument That the New York Law Was Conceived in Bigotry Is Without Merit.

The Corporation Counsel of New York has argued that since (allegedly) Art. 2, Sec. 1 of the New York State Constitution was conceived in original sin it is doomed for all time, however legitimate the present day purpose. He contends that one Charles A. Young proposed such a measure because of dislike of Southern and Eastern Europeans (brief, p. 22). However, Young's proposal, made in 1915, was not embodied in the 1916 revision of the New York State Constitution. Hence, Young's alleged polluted paternity cannot be traced into the 1922 amendment. Moreover, it is impossible to say that one man's views so influenced the entire New York State electorate that his notions should be imputed to the State of New York, which has to vote on all state constitutional amendments, in a referendum.

But even assuming arguendo that Art. 2, Sec. 1 was conceived in illegitimacy, its reincarnation in 1938 has certainly purged it of all its taint. In 1938, New York State held one of its periodic constitutional conventions, and it is the product of that convention which survives today. The Governor at that time was Herbert Lehman, a Jew, and a known adamant foe of racial and religious discrimination. The Chairman of the Constitutional Convention Committee which prepared the convention was Lieutenant Governor Charles Poletti, of Italian descent, and it would be strange if he were prejudiced against Southern Europeans. The roster of convention delegates contains names indigenous to all of Europe, as one would expect from New York's poly-

glot population. If these people were prejudiced against Southern and Eastern Europeans they would have to have disliked their own fathers.

Moreover, if this 1938 convention was such a hot-bed of bigots, as the Corporation Counsel would lead us to believe, it is remarkable that they inserted the first state constitutional provision specifically forbidding racial and religious discrimination, namely, Art. 1, Sec. 11, which says:

> "No person shall be denied the equal protection of the laws of this State, or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

Nor did voting qualifications go unnoticed. The 1938 Constitutional Convention Committee on Right of Suffrage & Qualifications to Hold Office proposed an amendment to strike out a limitation that citizens by marriage must be citizens for five years, but no alteration in the English language requirement was proposed. Intro. 681, Print No. 786-811-864-898, Rept. Doc. #4, N. Y. State Const. Conv. Journal & Documents. Lt. Gov. Poletti proposed an amendment that public welfare relief recipients would not be deprived of the right to vote, and Frances Bergen, now a Judge of the Court of Appeals, of New York State, proposed deletions of obsolete language in Art. 2, Sec. 1. See Intro. 496, print 523. However, nobody proposed to change the English literacy test, and there does not appear to have been debate on this. It seems to have been treated as a non-controversial provision. Under these circumstances,

whatever illegitimacy inhered in the birth of this test, if any, has been purged by subsequent re-enactment for proper purposes.

Moreover, even if the New York requirement is, as alleged, a neo-Know-Nothing product, it would still not be unconstitutional. Massachusetts and Connecticut both had English-language literacy tests, and Rhode Island had a property qualification, particularly aimed at foreign immigrants, and especially Irish Democrats, all during the reconstruction era. This was repeatedly brought to the attention of Congress, which refused to ban such tests while the amendments were on their passage. See the annexed appendices, which are being printed as law review articles, in the March, 1966 Stanford Law Review, the December, 1965 Washington University Law Quarterly, and in the Spring, 1966 Albany Law Review. Congress cannot now ban such tests regardless of the motive.

CONCLUSION

The Judgment Declaring That Sec. 4(e) of the Voting Rights Act of 1965 Is Unconstitutional, and Restraining the Attorney-General From Enforcing It, Should Be Affirmed.

Respectfully submitted,

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APPENDIX

Editorial, NEW YORK TIMES, July 30, 1965:

THE VOTING BILL

The compromise arrived at by House-Senate conferees on the voting rights bill makes final passage possible next week. This is important because no further time should be lost in registering Negroes to vote in coming elections.

Unfortunately, the conferees reconciled their two major differences in ways that are bad public policy. The decision to ban New York State's English-language literacy test for Puerto Rican citizens is a pure concession to political demogoguery. It is a device for discouraging the full integration of these citizens into a community that conducts all its public affairs in English. On the poll tax issue, the straight-forward language of the House bill outlawing the tax would have been preferable to the Senate version which the conferees accepted.

Yet, these errors of judgment do not vitiate the bill's central achievement. It provides a relatively simple, automatic and effective method to enable the Federal Government to see to it that Southern Negroes are registered and free to vote. In its basic provisions the bill represents a long-overdue move toward genuine democracy.

Editorial, NEW YORK TIMES, November 17, 1965:

OUR LANGUAGE IS ENGLISH

The Constitution of New York State provides that voters must prove their ability to read and write English. We have always felt—and still do—that this is a wise and reasonable provision. It was enacted long before the great influx of Puerto Ricans into New York, and it has never been enforced as a discriminatory measure. It rests on the fact that the affairs of New York State are conducted in English,

and that a knowledge of English is essential to understanding them.

Last summer Congress, under heavy political pressure, adopted a section of the Voting Rights Act that had the effect of permitting Spanish-speaking residents of New York to vote here if they had attended school in Puerto Rico. Now a three-judge Federal court in Washington has held that Congress exceeded its constitutional powers by this action. The court explicitly withheld any judgment on the desirability of the New York State requirement.

Another case on substantially similar grounds has been argued in the Federal District Court in Rochester, which has not yet handed down its decision. In any event the United States Supreme Court will undoubtedly have to resolve the issue finally, as is fitting in a matter of such importance. We hope that Court will affirm the right of New York State to continue to deal with this problem as it sees fit, so long as it does not do so in an arbitrary or discriminatory way.